(8)

No. 120, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF NEW YORK AND BRIEF OF *AMICI CURIAE*

JOHN J. KERR, JR.
Counsel of Record
SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017-3954
(212) 455-2000

Attorneys for Amici Curiae New York Landmarks Conservancy, Preservation League of New York State, and Historic Districts Council

Of Counsel:
JENNIFER A. HAND
LINDA H. MARTIN

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SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

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STATE OF NEW YORK,

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MOTION OF NEW YORK LANDMARKS CONSERVANCY, PRESERVATION LEAGUE OF NEW YORK STATE, AND HISTORIC DISTRICTS COUNCIL FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of this Court, the New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council (collectively, "Proposed New York Landmarks Amici" or "Proposed Amici") respectfully move for leave to file the accompanying brief as *amici curiae* in support of the State of New York's Exceptions to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R."). The State of New York has consented to the filing of this Brief. The consent of the State of New Jersey has been requested and refused.

The Proposed New York Landmarks Amici are local and state organizations dedicated to historic preservation. This

action, and the result recommended by the Special Master in the Report, raises the question of whether Ellis Island's historic structures are properly subject to the well-established and consistently-enforced historic preservation regulations of New York City or the less protective regulations of Jersey City, New Jersey. As organizations that have for years fought to safeguard the landmarks of New York State and City, the Proposed Amici have a demonstrable interest in the answer to this question.

Ellis Island, the gateway to this nation for millions of Americans, is an irreplaceable part of New York's cultural heritage. It was originally a part of New York, and, Proposed Amici believe, the Compact's drafters intended for it to remain a part of New York. The Report's conclusions to the contrary are unsupported by the plain meaning of the Compact, contemporaneous construction of its terms, the record in this case, and relevant precedent. Its recommendations must consequently be rejected.

The Proposed Amici possess a unique store of knowledge about historic preservation generally and the history of the New York City region in particular:

NEW YORK LANDMARKS CONSERVANCY

The New York Landmarks Conservancy is a not-for-profit civic organization chartered by New York State. It is dedicated to the preservation of structures of architectural, cultural and historic significance as well as to the designation and revitalization of historic districts. The Conservancy furthers these objectives by making grants and loans, and providing technical assistance, holding workshops, distributing publications, and sponsoring restoration and rehabilitation projects. The Conservancy is an experienced advocate for sound policies that encourage preservation as an integral part of urban planning. In this capacity, the Conservancy testifies frequently before the New York City Council, Board of

Standards and Appeals, City Planning Commission and Landmarks Preservation Commission on issues pertaining to historic preservation.

PRESERVATION LEAGUE OF NEW YORK STATE

The Preservation League of New York State is a New York not-for-profit corporation. Its mission is to protect and enhance historic values and property in the State of New York. Its 2,000 members throughout the state are concerned with the application and interpretation of preservation laws as well as environmental laws that impact upon historic resources. The League offers advice to hundreds of citizens every year who are concerned about the fate of historic properties in their region. It also maintains grant programs to assist in the rehabilitation and use of historic properties. The League has appeared as *amicus curiae* in numerous cases, such as the present one, concerning New York's landmarks preservation laws.

HISTORIC DISTRICTS COUNCIL

The Historic Districts Council is the citywide voice for New York City's 66 designated historic districts and for other neighborhoods meriting preservation. The Council's mission, to promote preservation awareness and involvement among New Yorkers, is implemented through a program of education, conferences, publications, and technical assistance. The Council's 28-member Board of Directors includes representatives from all five boroughs, 19 historic neighborhoods and three county-wide organizations, as well as from the design, planning and legal professions. The Council is the only grassroots association in New York City singularly dedicated to historic districts and the landmarks preservation laws that protect them.

The Proposed Amici participated at trial and in summary judgment and post-trial briefing before the Special Master.[1] Having now reviewed the Report, the record, and the applicable statutes and case law, the Proposed Amici believe that the Report should be rejected for at least two reasons. *First*, the Report incorrectly equates "property," as used in Article III, with "sovereignty," a term which appears nowhere in the Compact. No court or commentator at the time of the Compact would have found "sovereignty" in a mere "right of property." And it was for "property" rights, and "property" rights alone, that New Jersey settled in the Compact. This Court should not hold otherwise.

Second—and in the alternative—even if Article III did not give New York "sovereign" jurisdiction to the low water mark on the New Jersey shore, *at the very least* it gave New York "police power" jurisdiction over the same area. The Report's failure to address this issue is of particular significance to the Proposed Amici because what the Report acknowledges to be New York's "police jurisdiction" on the New Jersey side of the Article I boundary line is, in Proposed Amici's view, enough to give New York jurisdiction over, *inter alia*, "historic preservation" matters on the New Jersey side of the boundary. However, all indications are that New Jersey would think otherwise. Thus, the Court must fill this gap in the Report's conclusions, by affirmatively determining that New York has, *at the very least*, "police power" jurisdiction over the landfilled portions of Ellis Island.

The Proposed Amici are in a unique position to provide the Court with incisive views on these issues. The Proposed

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[1] The amicus group in which the Proposed New York Landmarks Amici participated below also included the National Trust for Historic Preservation in the United States and the Municipal Art Society of New York. The latter of these organizations is filing a separate Brief in support of New York's Exceptions, in which Proposed Amici herein elected not to join because of their desire to address the distinct issues raised by the Report outlined in the accompanying Brief.

Amici possess a unique store of knowledge about historic preservation generally and the history of New York City and Ellis Island in particular. Their experience in the area of historic preservation should be helpful (in combination with the views of Proposed Preservation Amici) in the full presentation to the Court of the novel issues raised by this action. Their access to scholars familiar with and research materials concerning New York City history give them the resources to subject the Report's premises and conclusions to searching analysis. In an original case of this type, where the Court's mandate is to not reach any decisions of necessarily far-reaching import before exhausting all valid avenues of inquiry, the participation of the Proposed Amici will, consistent with Supreme Court Rule 37.1, be of "considerable help" to the Court's review of the Report while allowing the Proposed Amici to fulfill their mission of speaking out forcefully to safeguard New York's landmarks, including the historic structures of Ellis Island.

WHEREFORE, the Proposed New York Landmarks Amici respectfully move this Court that leave be granted to file the annexed brief as *amici curiae*.

Dated: New York, New York
July 30, 1997

JOHN J. KERR, JR.
Counsel of Record
SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017-3954
(212) 455-2000
Attorneys for Amici Curiae New York Landmarks Conservancy, Preservation League of New York State, and Historic Districts Council

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Defendant.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF NEW YORK

The New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council (collectively, the "New York Landmarks Amici") submit this brief, as *amici curiae*, in support of the Exceptions of the State of New York to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R.").

INTEREST OF *AMICI CURIAE*[1]

The New York Landmarks Amici are local and state organizations dedicated to historic preservation. This action concerns whether the State of New York or the State of New Jersey has "sovereign" jurisdiction over Ellis Island. The dispute turns on the interpretation of the terms of a compact entered into between New York and New Jersey in 1834 concerning their Hudson River/New York Harbor boundary (the "Compact"), and the course of conduct of the two states with regard to this boundary in the ensuing century and a half.

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[1] Pursuant to Rule 37.6 of this Court, the New York Landmarks Amici state that this Brief was authored entirely by counsel for the Amici, and no person or entity other than the Amici and their counsel made a monetary contribution to the preparation of this Brief.

More importantly, however, this action, and the result recommended by the Special Master in the Report, raise the question of whether Ellis Island's historic structures are properly subject to the well-established and consistently-enforced historic preservation regulations of New York City or the less protective regulations of Jersey City, New Jersey.

As organizations that have for years fought to safeguard the landmarks of New York State and City, the New York Landmarks Amici have a demonstrable interest in the answer to this question. Ellis Island, the gateway to this nation for millions of Americans, is an irreplaceable part of New York's cultural heritage. It was originally a part of New York, and, Amici believe, the Compact's drafters intended for it to remain a part of New York. The Report's conclusions to the contrary are unsupported by the plain meaning of the Compact, contemporaneous construction of its terms, the record in this case, or relevant precedent. Its recommendations consequently must be rejected.

The New York Landmarks Amici possess a unique store of knowledge about historic preservation generally and the history of the New York City region in particular. Their experience in the area of historic preservation and local history will be helpful in the full presentation to the Court of the issues raised in this action. Their access to scholars familiar with and resources relevant to the history of the period will ensure that all factors of consequence are considered by the Court in assessing the Report's recommendations.

SUMMARY OF ARGUMENT

Article II of the Compact dictates, as New York ably argues, that New York has the "jurisdiction" of a "sovereign" over both the original and the landfilled portions of Ellis Island. Quite simply, Article II bestowed on New York jurisdiction that was coterminous with the entity of "Ellis Island" no matter how its physical boundaries might change

over time. It is on this basis, and this basis alone, that this case should be decided as a matter of compact construction. If the Court thinks otherwise, however, and deems it necessary to address Articles I and III of the Compact, it cannot do so on the basis of the Report's conclusions, for two alternative reasons.

First, the Report incorrectly equates "property," as used in Article III, with "sovereignty," a term which appears nowhere in the Compact. Notwithstanding Justice Holmes' dictum to the contrary in *Central Railroad Co. v. Jersey City*, 209 U.S. 473 (1908), no court or commentator at the time of the Compact would have found "sovereignty" in a mere "right of property," especially where, as was the case in Article III, the right at issue was no more than what the 1833 Commissioners would have understood as a *jus privatum* entitlement that had been expressly stripped of any *jus publicum* obligations or *jus regium* powers. Thus, while the Commissioners and their contemporaries may or may not have considered "jurisdiction" as always synonymous with "sovereignty," the Commissioners would never have equated "property" with "sovereignty." And it was for "property" rights, and "property" rights alone, that New Jersey settled in the Compact.

Second—and in the alternative—even if Article III did not give New York "sovereign" jurisdiction to the low water mark on the New Jersey shore, *at the very least* it gave New York "police power" jurisdiction over the same area. The Report, which confines itself to the "sovereign" effect of the Article I boundary line, never reaches this issue. It makes no attempt to define the scope of New York's residual (and facially "exclusive") jurisdiction on the New Jersey side of that boundary under Article III. The Special Master several times alludes to this jurisdiction as "limited," "legal," and, most significantly, as "police" jurisdiction. But the Report makes no effort to further circumscribe it, or determine its relationship to New Jersey's purportedly "sovereign" powers

over the waters and underwater lands in the vicinity of Ellis Island.

This omission is of particular significance to the New York Landmarks Amici because what the Report acknowledges to be New York's "police jurisdiction" on the New Jersey side of the Article I boundary line is, in the Amici's view, enough to give New York jurisdiction over, *inter alia*, planning, development and historic preservation matters on the New Jersey side of the boundary. All indications are, however, that New Jersey would not agree with this view of the scope of New York's residual powers. Hence, the Report's proffer of the Article I boundary as a full resolution of the dispute is far from such a full resolution. The Court must fill this gap in the Report's conclusions by affirmatively determining that New York has, *at the very least*, "police power" jurisdiction over the landfilled portions of Ellis Island.

POINT I

THE REPORT'S EQUATION OF "PROPERTY" AND "SOVEREIGNTY" IS WHOLLY UNTENABLE

This case should be decided, as a matter of compact interpretation, on the basis of Article II, and Article II alone. However, if the Court concludes otherwise and deems it necessary to examine Article III, it cannot adopt the Report's Article III conclusions because the equation of "property" and "sovereignty," on which the Report's Article III analysis is based, is wholly untenable. Article III granted to New York an "exclusive right of jurisdiction" over all the waters and the lands covered by such waters on the western side of the Hudson. New Jersey, by contrast, was granted only an "exclusive right of property" in the same subaqueous land, and it relinquished this ownership interest when it sold the landfilled areas to the Federal Government in 1904. If either of these rights can properly be equated with "sovereignty," it

is—as the State and City of New York argued before the Special Master—New York's "exclusive right of jurisdiction."

However, regardless of whether this Court is willing to equate "jurisdiction" with "sovereignty," there is no basis whatsoever for the Court to accept the Report's equation of New Jersey's "right of property" in the underwater lands around Ellis Island and "sovereignty" over those underwater lands. The plain meaning of Article III, which expressly distinguishes between all-inclusive "jurisdictional" and more limited "property" rights, does not permit such an equation. *See* Brief of Preservation Amici dated Mar. 25, 1996 (Docket No. 256). Nor—as Amici show below—would courts or commentators at the time of the Compact have found "sovereignty" in a mere "right of property," especially where, as was the case in Article III, the right at issue was no more than what the 1833 Commissioners would have understood as a *jus privatum* entitlement in underwater lands that had been expressly stripped of any *jus publicum* obligations or *jus regium* powers. This Court should not hold otherwise.

A. ARTICLE III GRANTED TO NEW JERSEY ONLY *JUS PRIVATUM* RIGHTS IN THE UNDERWATER LANDS ON THE WESTERN SIDE OF THE HUDSON RIVER

Essential to understanding the nature of the "exclusive right of property" granted to New Jersey by Article III is a more general understanding of the meaning "rights of property" in "underwater lands" had for the Commissioners and their contemporaries in the 1820s and 1830s. The most compelling evidence of the meaning such terms had in this period is to be found in the language of the debate concerning rights in lands under navigable waters that was ignited by the New Jersey Supreme Court's 1821 decision in *Arnold v. Mundy*, 6 N.J.L. 1 (1821), and not resolved until this Court's decision in *Martin v. Waddel*, 41 U.S. 367 (1842). That

debate, which involved conflicting claims of title to the underwater lands in New Jersey's Raritan Bay, was well-known to Commissioners from New York and New Jersey who drafted the Compact, and necessarily affected their understanding of the "right of property" that Article III granted to New Jersey.

For many years prior to 1821, the Board of Proprietors of East Jersey had claimed title to all lands under water in the northern half of New Jersey. The Proprietors were among the successors in interest to Lord Berkeley and Sir George Carteret, the original grantees of what is now New Jersey, and purported to derive title to these underwater lands from Berkeley's and Carteret's 1664 grant from the Duke of York, which included, *inter alia*, "'all rivers, harbours, waters, fishings, &c.'" in New Jersey. *Arnold*, 6 N.J.L. at 70. That grant had originally conferred both "soil" and "self-government" (*i.e.*, "property" and "jurisdiction") on Berkeley and Carteret, and thus on the Proprietors as their successors. *Id.* at 19. In 1702, however, the Proprietors—who had encountered difficulties governing the colony—ceded all rights of "government" back to the Crown, while purporting to retain their property rights in all the previously granted lands, including, the Proprietors believed, those lying under the navigable waters of the State. *Id.* at 27-29.

In 1821, however, the New Jersey Supreme Court held in *Arnold v. Mundy* that the lands under New Jersey's navigable waters belonged not to the Proprietors but to the State. The *Arnold* court concluded that such underwater lands, which in England had traditionally been the property of the Crown, had belonged to the Proprietors when they served as both the property holders and government of New Jersey, but had been ceded back to the Crown, as part of the *jura regalia*, in 1702. The State had succeeded to those rights after the Revolution, and consequently held the same

rights in the underwater lands that the King had held in such lands in England.

The State's authority over these lands, like those of the Crown, had three distinct aspects. It held the lands in fee simple (*jus privatum*), like any other individual, and could, arguably, make use of the lands as it desired. However, it could only make such use of the lands subject to the rights of the public (*jus publicum*) to use the waters above these lands for navigation and fishing. *See* Stuart A. Moore, *History of the Foreshore* 185-211 (1888). The *jus publicum* obligations with respect to the underwater lands "passed to the [State] as one of the royalties incident to the power of government," and it required the State to hold the lands as a "public trust for the benefit of the whole community" and to enforce this "public trust" through the use of its *jus regium* or sovereign regulatory powers. *Martin*, 41 U.S. at 413; *Arnold*, 6 N.J.L. at 77-78. As a result, the *Arnold* court concluded, such lands could not be sold or otherwise alienated by the State because the "sovereign power . . . cannot, consistently with the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common rights." *Arnold*, 6 N.J.L. at 78; *see also Martin*, 41 U.S. at 413; *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823); *Bell v. Gough*, 23 N.J.L. 624, 655-57 (1852); *see generally Idaho v. Coeur d'Alene Tribe*, No. 94-1474, 1997 WL 338603, at *17 (U.S. June 23, 1997); Richard D. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

Fearful of being compelled to forfeit interests in valuable underwater lands, the Proprietors contested the outcome in the *Arnold* case. The Proprietors accepted the view that the lands they claimed came encumbered with *jus publicum* obligations, but argued that the fee simple interest in such underwater lands could have been conveyed to the

Proprietors separate and apart from the *jura regalia* of government power. The *jus privatum* right of property, the Proprietors contended, could plainly be granted without *jus regium* powers to enforce the *jus publicum* trust in such lands. To make this argument, the Proprietors solicited opinions in 1824 from several prominent attorneys and jurists including Chancellor James Kent of New York and future New York Commissioner Peter Augustus Jay.

The opinions rendered on behalf of the Proprietors tell us much about contemporary understandings of property rights in "underwater lands." Most importantly, these opinions make clear that the "right of property" in lands under navigable waters was viewed by many (including at least one of the 1833 Commissioners) as independent of and wholly "unconnected with attributes of political power." In the words of Chancellor Kent:

> *The right of ownership of the soil in the navigable waters is not per se, an incident to sovereignty.* It is not within the essential powers of government, because it is a right entirely subordinate to the *jus publicum*. It is not in the sense of the best English jurists, nor is it in the sense and practice of mankind, an incident and inseparable from royalty; and I am clearly convinced in my own mind . . . that the Proprietors of East Jersey were seized of the soil, and had a legal title to the land under tide waters at the time of their surrender of their powers of government to Queen Ann.

James Kent, *Opinion By Chancellor Kent of New York (Dec. 16, 1824)*, reprinted in *East Jersey Proprietary Titles: Abstract of Title and Opinions of Chancellor Kent and E. Van Arsdale* 11 (1881) (emphasis added).

In his opinion, Peter Augustus Jay, the future New York Commissioner, was even more adamant in insisting that

"sovereign" and "proprietary" rights in underwater lands could be segregated:

> It is proper to distinguish between the fee simple of the soil, and a right to exclusive use of it for all purposes. An individual may be seized in fee of the soil of a highway, yet the public have a right of passage over it; so the title to the soil of a fresh water river may be in one, and the right of fishing it in another. Almost all the arguments in [*Arnold v. Mundy*] tend to shew that use of navigable waters for various purposes is common to the public, but are inapplicable, (as it appears to me,) to the question in whom the fee simple of the soil is vested.

Id. at 2 (P.A. Jay, *Opinion* (Nov. 26, 1824)).

Viewed in light of the terms of this debate, which was not finally resolved until this Court's decision in *Martin v. Wadell* in 1842,[2] the only proper conclusion is that the "exclusive right of property" granted to New Jersey in Article III entailed no more than a *jus privatum* right in the underwater lands on the western side of the Hudson. The Commissioners and their contemporaries understood fully the distinction between *jus privatum* and *jus publicum* interests in underwater lands, they used the term "property" to denote *jus privatum* rights and the term "jurisdiction" to denote *jus publicum* obligations as enforced by *jus regium* powers, and they viewed these rights as conceptually segregable even if, for purposes of the ongoing debate, certain of the

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[2] In *Martin*—ten years after the Compact—the Court adopted the *Arnold* holding that lands under navigable waters were held "as a public trust for the benefit of the whole community," 41 U.S. at 413, and thereby laid the groundwork for later case law permitting alienation of such lands (and thus severance of *jus privatum* and *jus publicum* interests) upon satisfaction of a public interest standard. *See Coeur d'Alene Tribe*, 1997 WL 338603, at *17; Lazarus, *supra*, at 633-44 (tracing evolution of "public trust" doctrine).

Commissioners' contemporaries might have been unwilling to concede that the rights were entirely severable.

This distinction and terms that would be used consistently to discuss it had become part of the dialogue between New York and New Jersey as early as 1807. In one of the Propositions submitted by the New Jersey Commissioners to their New York counterparts during the first round of negotiations that year, New Jersey acknowledged that "[a]rms of the sea and navigable rivers are subject to a *jus publicum*, a *jus privatum*, and a *jus regium*." (NJ Ex. 213.) In another Proposition, New Jersey explained the bases for its claims to New York Harbor and the Hudson River in the following terms:

> [T]he King of Great-Britain possessed, not only the *property* in all navigable rivers, but by his prerogative, claimed and exercised (among his *regalia*) *jurisdiction* over them, and over all shores below high water mark, and over all ports and harbors whatsoever within his American colonies. It is therefore evident that if the grant to the first settlers of New-Jersey, had contained an express limitation to high water mark, it would only follow that the *property* as well as the *jurisdiction* over the subject matter now in controversy was retained by the duke and again resulted to the crown when he became king of England, and would be no more than if the crown had retained originally the *property* & *jurisdiction* of a large lake in the centre of New-Jersey.

(NJ Ex. 209 (emphasis added).) The New Jersey Commissioners went on to contend that the rights thus retained by the Crown devolved upon New Jersey after the Revolution. However, what matters is not the validity of New Jersey's claims, but the fact that it framed these claims in terms of two distinct rights, "property" and "jurisdiction," which, for the reasons set forth above, can be equated with

jus privatum rights and *jus publicum* obligations as enforced by *jus regium* powers.[3]

The terms of the dialogue would not change significantly in the ensuing twenty years. In 1828, New Jersey was still expressing concerns about New York's "*ownership* and *jurisdiction* up to [New Jersey's] very shores," setting forth distinct bases for its claims to both "property" and "jurisdiction" in the Hudson River, and contending for "equal and concurrent rights over the Hudson" and "property rightfully extend[ing] to the middle of that river." (NJ Ex. 273, at 10; NJ Ex. 278, at 40, 44.) Similarly, in its 1829 Bill in this Court, New Jersey's repeated refrain was for "property, sovereignty, and jurisdiction," with the Bill's only efforts to distinguish among these rights suggesting that "sovereignty" could not be differentiated from "jurisdiction" and that "property" was something that the State could hold in the

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[3] That there were always two interests in these underwater lands at issue is also evidenced by the terms of the 1804 dispute between the Associates of the Jersey Company and the Corporation of the City of New York that is referenced in several of the Commissioners' reports. (NJ Ex. 272, at 6-7.) Concerned that the City of New York might claim some interest in the underwater lands adjacent to Powles Hook (now Jersey City) on which it planned to build wharves and piers, the Jersey Company retained Alexander Hamilton to evaluate both New York City's "property" and "jurisdictional" claims to these lands. Hamilton declined to opine concerning the "jurisdictional" claims, but he had no doubts that "the Corporation of the City of New York have no right of soil in or title to the land, under the water to and adjoining Powles Hook." 26 *The Papers of Alexander Hamilton* 221, 224, 227-31 (Harold C. Syrett et al. eds., 1961-79). Attorneys later retained by the City of New York agreed with Hamilton's conclusion as to the City's lack of property rights, but believed that the State had both property and jurisdictional rights in these lands, and ultimately persuaded the New York Attorney General to bring a suit that was litigated for years afterwards with inconclusive results. 3 *Minutes of the Common Council of the City of New York, 1675-1776*, at 520-23, 552, 693-94, 712-13 (1905); *see also* Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, at 115-16 (1983).

same manner as an individual, and therefore, a mere *jus privatum* right. (NJ Ex. 293, at 26 (contending that historically "no right of property existed or could exist" in the Hudson River, as demonstrated by the fact that "all the ancient grants made by the Duke of York to individuals while he remained Duke . . . [were] limited to the low-water mark" on the New York side of the river).)

In light of contemporaneous understandings of the rights at issue and the terminology of the longstanding dialogue between the States, the terms of compromise reached in 1833 appear unambiguous. New Jersey had sought both "property" and "jurisdiction" in the lands under the waters dividing the states, with a full understanding of the distinction between these two rights. It settled for a mere "property" right, with none of the trappings of "jurisdiction." If granted, the right of "jurisdiction" would have given New Jersey both the *jus privatum* rights of a private owner and the *jus publicum* obligations of a sovereign in these underwater lands. However, it was not granted. Instead, "exclusive jurisdiction," and therefore the obligation to use *jus regium* powers to protect *jus publicum* rights, were expressly left in the hands of New York.[4]

Much as the New Jersey Proprietors had ceded the "right of government" back to the Crown in 1702 in exchange for a

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[4] The agreement reached in the Compact of 1834 with respect to underwater lands is to be contrasted with the agreement reached between New York and Massachusetts in the earlier Hartford Compact. In the Hartford Compact, which this Court addressed in *Massachusetts v. New York*, 271 U.S. 65 (1926), "property rights" in "underwater lands" were not expressly mentioned, so the Court invoked the presumption that any rights not expressly granted by a sovereign are retained by the sovereign to hold that lands under Lake Ontario, in which Massachusetts claimed a proprietary interest, remained the property of New York by virtue of its retention of jurisdiction over the Lake. *Id.* at 90. Here, by contrast, "property" and "jurisdictional" rights in underwater lands are expressly segregated, and should be so regarded by this Court.

continued "right of property" in lands granted to them by the Duke of York, New Jersey's 1833 Commissioners allowed New York to retain the power of governmental jurisdiction over the underwater lands on the western side of the Hudson in exchange for an "exclusive right of property" in the same lands. That right, which Article III expressly strips of any jurisdictional powers, cannot be construed any more broadly than the property rights of the Proprietors after their 1702 renunciation of the "right of government."[5]

B. *JUS PRIVATUM* RIGHTS OF PROPERTY HAVE NEVER BEEN EQUATED WITH SOVEREIGNTY

Accepting that Article III granted to New Jersey no more than a *jus privatum* right of property in the waters and underwater lands west of the middle of the Hudson River undermines entirely the Report's conclusion that New Jersey's "exclusive right of property" must be equated with "sovereignty" over those waters and underwater lands. The *jus publicum* obligation, with its correlative *jus regium* power of enforcement, constitutes the authority of a sovereign. *Jus privatum* rights, by contrast, are not the equivalent of

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[5] This is not to say that New Jersey did not attribute great value to the rights it obtained under Article III. By virtue of Article III, New Jersey acquired title to property that could generate revenues in two ways: by sale for future filling and development, and for use as "Oyster grounds." With respect to the former, Peter Augustus Jay, in the Opinion he rendered on behalf of the Proprietors in 1824, acknowledged that a *jus privatum* right in underwater lands could have value notwithstanding *jus publicum* limitations on its use because "if the soil is private property, then no one can, without the consent of the owner, erect upon it wharves, mill-dams or other erections." Opinion of P.A. Jay, *supra*, at 3. As to the latter, one contemporary source suggests that New Jersey's interest in a "right of property" in the Hudson River and New York Bay was chiefly provoked by a desire to control the valuable "Oyster grounds" in those waters. Letter from John Rutherford to Peter D. Vroom dated June 10, 1832 (Southard Papers, Princeton University).

sovereignty, and no court or commentator, at the time of the Compact or since, has held otherwise.

In the understanding of the 1820s and 1830s, the distinction between the state as a sovereign and the state as a private property holder was well-established and fully appreciated. Indeed, Vattel, Chancellor Kent, and other commentators readily acknowledged that a "sovereign" could hold property like an individual, but, in the same instant, observed that such proprietary activities were wholly independent of its powers as a sovereign. *See, e.g.*, Emmerich de Vattel, *The Law of Nations*, bk. II, § 83 (1792) ("[M]any sovereigns have fiefs, and other properties, in the lands of another prince; and they therefore possess in the manner of individuals."). The decisions of this Court, at the time of the Compact and since, reflect a similar understanding of the distinction between a government's "sovereign" and "proprietary" activities. *See The Santissima Trinidad*, 20 U.S. 283, 353 (1822) (recognizing that a sovereign may "hold a private domain within another territory"); *City of Hoboken v. Pennsylvania R.R.*, 124 U.S. 656 (1888) (distinguishing between the "public easement of access to navigable waters," which "inheres in the state in its sovereign capacity," and the "title of the state in land under tide-waters" which is "strictly proprietary").

The Commissioners in the 1833 negotiations shared fully this understanding of the distinction between a sovereign entity's "sovereign" and more limited "proprietary" activities. Indeed, the 1807 New Jersey Commissioners, among whom was future 1833 Commissioner James Parker, had cited Vattel in one of their letters to their New York counterparts for the proposition that "the empire of a country and the property in its soil are not inseparable," and that therefore, "nothing prevents the possibility of property belonging to a nation in places not under its obedience." (NJ Ex. 209, at 43 (citing Vattel, *supra*, § 43).)

On the New York side of the table, both Peter Augustus Jay and Benjamin F. Butler, had confronted this distinction more than once in dealing with the affairs of the Corporation of the City of New York, an entity whose property-holding powers were as important as and, in an age of increasing regulatory activity, sometimes difficult to distinguish from its governmental or jurisdictional powers. *See generally* Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (1983); *see also* Elizabeth Blackmar, *Manhattan for Rent, 1785-1850* (1989).

Thus, in *Mayor of New York v. Slack*, 3 Wheel. Cr. Cas. 237 (N.Y.C.P. 1824), Jay, who often represented the Corporation in the 1820s, had a part in persuading a New York court to hold that "in respect to a corporation invested with the local government of a place, a distinction is to be made between its capacity for holding and transferring property, and its capacity to legislate for the good of the place with whose government it is invested." *Slack*, 3 Wheel. Cr. Cas. at 258-59. As a property holder, the sovereign entity could buy, hold and sell property like an individual, and be bound by the property-holding obligations of an individual, but these obligations were distinct from and always trumped by its obligations to use its entirely distinct "legislative power" for the public good.[6]

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[6] Among the properties held by the Corporation of the City of New York in its "proprietary" role were the underwater lands bordering lower Manhattan (to a distance of 400 feet from the shore) that had been conveyed by the City to individuals in "waterlot grants" since the late 17th century. *See* Hartog, *supra*, at 44-59. In the Opinions rendered on behalf of the New Jersey Proprietors in 1824, both Chancellor Kent and Jay pointed out that these underwater lands—like those granted to New Jersey by Article III—had been granted to the City as "property," and not as part of any sovereign prerogative. *See* Opinion of Chancellor Kent, *supra*, at 14; Opinion of P.A. Jay, *supra*, at 7.

Butler recognized the same distinction, with the same effect, in rendering an opinion in January 1834 as to whether the Corporation of the City of New York could grant a license for a second ferry to Brooklyn:

> The authority to establish ferries granted to the city by the charter, is a branch of the sovereign power, and like all the other legislative and administrative powers conferred on them, was granted to the Corporation "*for the good rule and government of the City*," and *not as a subject of property*. In this respect, it is to be carefully distinguished from the express grant of the Old Ferry, contained in the first charter, and subsequently confirmed. *The franchise of keeping up that ferry for ever, is granted to the Corporation as an incorporeal hereditament, to be held by them on the same tenure as if the same had been granted to an individual. They have a freehold property in it.* But the general power to establish other ferries is delegated to them as depositories in this respect of the prerogative of the government.

All the Proceedings in Relation to the New South Ferry between the Cities of New York and Brooklyn from December 1825 to January 1835 (1835) (emphasis added).

It is this same distinction between "sovereign" and "proprietary" rights, so familiar to the Commissioners and their contemporaries, that is embodied in the Compact's grant of *jus privatum* rights to New Jersey in underwater lands with respect to which New York retained *jus publicum* obligations and *jus regium* powers. By settling for an "exclusive right of property" in lands expressly subject to New York jurisdiction, New Jersey accepted what Vattel called "fiefs, and other properties, in the lands of another prince," and New Jersey cannot now be held to "possess" such lands other than

"in the manner of [an] individual." Vattel, *supra*, at bk. II, § 83.

Subsequent courts have so held. *See State v. Babcock*, 30 N.J.L. 29, 31 (1862) ("New Jersey is bounded by the middle of the Hudson river, and *the state owns the land under the water to that extent,*" with "exclusive jurisdiction" retained by New York) (emphasis added); *Kiernan v. The Norma (The Norma)*, 32 F. 411 (S.D.N.Y. 1887) ("[T]he state of New Jersey has nothing more than the mere right of property,—the naked legal title."); *see also People v. Central R.R.*, 42 N.Y. 283, 312 (1870) (Earl, J. dissenting) ("By this provision simply *property* is given to New Jersey, and the governmental jurisdiction and authority of New York is not interfered with.").

New Jersey cannot claim more now. It was property rights, and property rights alone, that New Jersey bargained for and obtained in Article III. The Report's conclusions to the contrary must consequently be rejected.

POINT II

IN THE ALTERNATIVE, THE COURT SHOULD AFFIRMATIVELY DETERMINE THAT ARTICLE III GRANTED TO NEW YORK, AT THE VERY LEAST, "POLICE POWER" JURISDICTION ON THE NEW JERSEY SIDE OF THE ARTICLE I BOUNDARY LINE

Should the Court conclude that neither Article II nor Article III gives New York full "sovereignty" over all of the current Ellis Island, it should alternatively determine that Article III left to New York, *at the very least,* "police power" jurisdiction over all of the Hudson River's waters and underwater lands, including the landfilled portions of Ellis Island. The Report, which confines itself to the "sovereign" effect of the Article I boundary line, never reaches this issue. It makes no attempt to define the scope of New York's residual (and facially "exclusive") jurisdiction on the New

Jersey side of that boundary under Article III. The Special Master several times alludes to this jurisdiction as "limited," "legal," and, most significantly, as "police" jurisdiction. (R. at 57, 65, 67, 76, 78.) But the Report makes no effort to further circumscribe it, or determine its relationship to New Jersey's purportedly "sovereign" powers over the waters and underwater lands in the vicinity of Ellis Island or at any other point along the boundary line's more than twenty-mile length. The Court must fill this gap in the Report's conclusions, by affirmatively determining that New York has, *at the very least*, "police power" jurisdiction over the landfilled portions of Ellis Island.

A. At the Very Least, New York Retained Under Article III Broad Regulatory Powers Over the Waters and Underwater Lands of the Hudson River

If New York did not retain "sovereign" jurisdiction over the whole of the Hudson River under Article III, it did retain, *at the very least*, jurisdiction over a broad array of regulatory matters affecting both the waters and underwater lands of that river. Such regulatory powers, contemporaneous evidence shows, are the least that the New York Commissioners bargained for in the 1833 negotiations and what both the New Jersey Commissioners and subsequent commentators and case law concede New York retained in the Compact.

The New York Commissioners set forth what they believed they had secured for New York in an October 20, 1833 letter to New York Governor William L. Marcy:

> [W]e trust that *the jurisdiction necessary for the health, improvements, and police of that City* has been amply secured, and that the agreement herewith delivered to you will be satisfactory to the legislature and to our fellow-citizens generally.

(NJ Ex. 312 (emphasis added).) This post-negotiation account of New York's objectives accords with the assurances offered by Benjamin F. Butler, the lead New York Commissioner, to fellow Commissioner Peter Augustus Jay in March 1833, that "what is due to *the commerce, health, police and improvements of your city* . . . [is] to be carefully considered in the propositions we may submit or receive." Letter from Butler to Jay quoted in John Jay, *Memorials of Peter A. Jay: Compiled for his Descendants* (1929) (emphasis added).[7]

It also accords with what the New Jersey Commissioners conceded as early as 1827 New Jersey was willing to relinquish to New York:

> In terms of settlement submitted by your commissioners, they endeavored to remove any just ground of exception, by *yielding to New-York exclusive jurisdiction over the adjoining waters in several important matters, which the health and commercial welfare of the city of New-York seemed to require.*

(NJ Ex. 273, at 10 (emphasis added).) It is also what Justice Lucius Q.C. Elmer, one of the New Jersey Commissioners, acknowledged years later had, at a minimum, been retained by New York in Article III:

> It being suggested on behalf of New Jersey, that, waiving all considerations of abstract right, New York should acknowledge the true boundary line to be the middle of the river, and that New Jersey should agree

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[7] Butler's statements to Jay in early 1833 also accord with statements Butler made to 1828 New Jersey Commissioner John Rutherford in June 1832, to the effect that New York had no interest in the "Oyster grounds" of New York Bay (*i.e.*, property rights) but was "anxious for some regulation relative to quarantine and jurisdiction near the city of New York." Letter from Rutherford to Peter D. Vroom dated June 10, 1832 (Southard Papers, Princeton University).

> that *New York should have all such rights west of that line as might be deemed important to secure to that State the right to regulate the police and the quarantine on the whole of the waters dividing the States;* this proposition, after time had been taken for full consideration and consultation, was acceded to by the New York commissioners.

Lucius Q.C. Elmer, *The Constitution and Government of the Province and State of New Jersey* 459 (1872) (emphasis added); *see also State v. Babcock*, 30 N.J.L. 29, 33 (1862).

Subsequent case law has described the rights and powers retained by New York in comparable terms. Thus, in the 1870 *Central Railroad* case, the New York Court of Appeals concluded that Article III granted to New York a "police jurisdiction" for the "protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York." *People v. Central R.R.*, 42 N.Y. 283, 300 (1870). Later cases have followed suit. *See Ferguson v. Ross*, 27 N.E. 954 (N.Y. 1891) ("the purpose of vesting exclusive jurisdiction over these waters in the state of New York was to promote the interests of commerce and navigation"); *Ross v. Mayor of Edgewater*, 180 A. 866, 870 (N.J. 1935) (Article III permitted New York to retain "a general police jurisdiction, for the promotion of the interests of commerce and navigation, over the waters of the bay and river to the low-water mark of the New Jersey shore"), *aff'd*, 184 A. 810 (N.J.), *cert. denied*, 299 U.S. 543 (1936); *Tennant v. State Bd. of Taxes and Assessments*, 113 A. 254 (N.J. 1921) ("this jurisdiction has been held by the courts of both New York and New Jersey to be a jurisdiction simply for the exercise of the police power").

B. The Broad Regulatory Powers Retained By New York Under Article III Are Synonymous With the "Police Power" of State and Local Governments

The broad powers that all parties thus concede were retained by New York under Article III are synonymous with what this Court has since come to recognize as the "police power" of state and local governments. In fact, the "police power" doctrine had its origins in the same period as the Compact, and was being vigorously debated in this and other courts during the years when New York and New Jersey were moving toward a resolution of their boundary dispute. *See* William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061 (1994). The terms of that debate, and the scope of the evolving doctrine, are echoed in what the Commissioners and others described at the time as the powers New York retained under Article III.

This crossover between the developing "police power" case law and the Compact is not surprising for a number of reasons, not the least of which is the fact that Peter Augustus Jay, the New York Commissioner with the greatest interest in the "commerce, health, police and improvements" of New York City, represented the Corporation of the City of New York in a trio of cases in the early 1820s, the so-called "cemetery cases," that legal scholars acknowledge laid the groundwork for much subsequent "police power" jurisprudence.[8] *See Mayor of New York v. Slack*, 3 Wheel.

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[8] The "cemetery cases" concerned the validity of a New York City ordinance prohibiting burials in cemeteries the City had granted to various New York City churches more than a century before. The religious groups made a variety of arguments based on vested rights and real property theories while the City, represented by Jay, argued that the

Cr. Cas. 237 (N.Y.C.P. 1824); *Corporation of the Brick Presbyterian Church v. Mayor of New York*, 5 Cow. 538 (N.Y. Sup. Ct. 1826); *Coates v. Mayor of New York*, 7 Cow. 585 (N.Y. Sup. Ct. 1827); *see generally* Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (1983); Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 565 (1904); Christopher Tiedemann, *A Treatise on the Limitations of the Police Power in the United States* 427, 583 (1886); Thomas M. Cooley, *A Treatise on Constitutional Limitations* 127, 206-7, 283, 595 (1868); 2 James Kent, *Commentaries on American Law* 274-76 (1826-30).

The holdings of the New York courts in the "cemetery cases" are echoed in various contemporaneous and later "police power" cases in this Court. In these cases, the main inquiry is the line between state and federal power, but in pursuing this inquiry, the Court often found itself compelled to define the scope of the powers that are left to the states. In doing so, it circumscribed the powers reserved to the states in the same broad terms that contemporaneous accounts describe the powers that New York retained under Article III.

Most interesting in this respect are *Gibbons v. Ogden*, 22 U.S. 1 (1824), *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829), and *Mayor of New York v. Miln*, 36 U.S. 102 (1837). All three of these cases examined the scope of the "police power" in the context of the development,

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statute entailed a legitimate exercise of the City's power to enact "police regulations." *Coates v. Mayor of New York*, 7 Cow. 585, 597-601 (N.Y. Sup. Ct. 1827) (Argument of P.A. Jay). The New York court upheld the City ordinance as validly targeted at the "health, welfare and improvement" of the City, and therefore, among the array of regulations properly categorized as "police regulations." *See Slack*, 3 Wheel. Cr. Cas. at 243-45, 249-52 (enumerating the many areas in which New York City had validly legislated for the public good).

maintenance and management of rivers, harbors and underwater lands—the same setting that it was contemplated New York would exercise the "exclusive jurisdiction" retained by it in Article III. In so doing, these cases confirm that what the Commissioners believed New York had retained in Article III can properly be equated with what this Court was coming to define, with ever greater specificity, as the "police power."

Gibbons, with which the Commissioners and their contemporaries were undoubtedly familiar, concerned the federal power to regulate commerce and navigation in interstate navigable waterways like the Hudson River. In *Gibbons*, Chief Justice Marshall mapped out the contours of most commerce clause and police power jurisprudence to come, and, in so doing, left to the states precisely the powers over New York's rapidly developing harbor that the New York Commissioners retained for New York in Article III—"that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all of which can be most advantageously exercised by the States themselves," including "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c." 22 U.S. at 203.

Willson confirmed that the filling and improvement of underwater lands, like those over which Article III gave New York "exclusive jurisdiction," was within the "police power" of the States. Confronted with a "commerce clause" challenge to a Delaware statute authorizing the erection of a dam across a coastal creek, the Court looked to the object and likely effect of the legislation and found that "the value of the property on its banks must be enhanced . . . and the health of the inhabitants probably improved." 27 U.S. at 251. Without clear indication that any issue of federal concern was

implicated, this Court upheld the challenged statute, concluding that "[m]easures calculated to produce these objects [*i.e.*, the filling and improvement of underwater lands], provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states." *Id.* at 251. The Commissioners on both sides of the 1833 negotiating table—on the basis of over a century of landfilling in New York Harbor—also believed that the power to authorize improvements of underwater lands was in the States, and by the terms of Article III, expressly reserved this power (to the extent that the underwater lands were not immediately contiguous to the New Jersey shore) to New York.

Miln expanded the scope of the police power still further, to permit the States to regulate with respect to all matters that were essential to "the health and commercial welfare" of the community. In *Miln*, this Court upheld a New York statute requiring masters of vessels arriving in the same New York Harbor with which the Compact dealt to report the names of foreign passengers. It did so, in part, by looking to a broadly-worded *Federalist* pronouncement that "the powers reserved to the several states, will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement and prosperity of the state." 36 U.S. at 133 (quoting *The Federalist No. 45*).

In a passage that echoes clearly the words of the Commissioners concerning what New York had retained in Article III, this Court held in *Miln* that the states have "undeniable and unlimited jurisdiction" to "advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which [they] may deem to be conducive to these ends." *Id.* at 139. The "undeniable and unlimited jurisdiction" that this Court thus expressly reserved to the States is no different

from the narrowest reading of the "exclusive right of jurisdiction" at issue in Article III, which the New York Commissioners told New York's Governor in October 1833 had been "secured" for New York and was "necessary for the health, improvements, and police" of New York City. (NJ Ex. 312.)

C. The "Police Power" Jurisdiction Retained By New York Under Article III Gives It Current Jurisdiction Over Historic Preservation Matters On The New Jersey Side Of The Article I Boundary

The "police power" jurisdiction that, at a minimum, New York retained in Article III gives it current regulatory control over many matters, including historic preservation issues, on the New Jersey side of the Article I boundary. The already expansive definition of the "police power" developed by the time of the Compact expanded still further throughout the 19th and into the 20th century. The measures required to address the "health, welfare and improvements" of the community grew more numerous as society grew more complex, and this Court, with consistent flexibility, repeatedly lengthened the list of subjects properly subject to the "police power." Under its Article III grant, New York is now entitled to exercise jurisdiction on the New Jersey side of the boundary line (including on the landfilled portions of Ellis Island) over all these subjects.

1. The Scope of the "Police Power" Jurisdiction Retained By New York Under Article III Has Expanded Since Execution of the Compact

The scope of the "police power" doctrine has expanded significantly since execution of the Compact. As a result, the distinct powers contained in the "police power," or which may exist beyond its scope, have grown less and less

susceptible of precise or exhaustive definition. In 1911, Justice Holmes could describe the "police power" as "extend[ing] to all the great public needs [and] . . . be[ing] put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911). By 1954, its parameters had grown broader still, provoking Justice Douglas to observe that the "purposes" served by the "police power" are "neither abstractly nor historically capable of complete definition." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

What is clear, however, is that in the years since the Compact, this Court has upheld a broad array of social and economic regulation under the rubric of the "police power," in the face of challenges that these regulations violated vested property rights. *See generally* William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L. J. 1061 (1994); Maureen Kordesh, *"I Will Build My House With Sticks": The Splintering of Property Interests Under The Fifth Amendment May Be Hazardous To Private Property*, 20 HARV. ENV. L. REV. 397 (1997); *see also* Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (1904).

Most significantly for this case, the "police power" has become the bedrock upon which historic preservation law has developed. In a line of cases commencing with *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and running through *City of Boerne v. Flores*, No. 95-2074, 1997 WL 345322 (U.S. June 25, 1997), this Court has consistently looked to state "police power" to validate regulations concerned with historic and aesthetic land-use and zoning issues. In *Euclid*, the Court upheld a zoning ordinance prohibiting commercial development in a residential area, concluding that "[t]he ordinance now under review, and all

similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare." *Id.* at 387-88.

Historic preservation law came into its own when the Court similarly invoked the "police power" to uphold land-use controls based on aesthetic considerations in *Berman v. Parker*. In *Berman*, the question raised was whether the District of Columbia could raze a salvageable building in a deteriorating neighborhood as part of an aesthetically-driven urban renewal plan. Looking to the broad scope of the "police power," Justice Douglas answered on behalf of the Court with a resounding yes, concluding that "[i]t is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33.

All doubt as to whether historic preservation regulation was within the scope of government police power was dispelled by the Court's 1978 decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Specifically, the Court held that restrictions imposed by New York City's Landmarks Preservation Law on New York's Grand Central Station did not effect a taking of the property in violation of the Fifth Amendment. In upholding the New York law, the Court explicitly dismissed the idea that aesthetic considerations alone are not a proper basis for the exercise of the government's police power. To the contrary, the *Penn Central* court affirmatively concluded that—on the basis of the "police power"—a state could constitutionally promote historic preservation goals because such goals undoubtedly served the public interest.

2. New York Is Entitled To Exercise Jurisdiction To The Full Extent of The "Police Power"

New York is entitled to reap the benefits of the expanded scope of the "police power" by being permitted to use its Article III jurisdiction to regulate with respect to, *inter alia*, historic preservation matters on New Jersey's side of the Hudson. This is the case for two separate sets of reasons. *First*, to the extent that the Compact is construed as a contract, such a construction accords with the intent of its drafters, and should be given effect. *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (compacts are construed as both contracts and statutes); *Massachusetts v. New York*, 271 U.S. 65 (1926) (object of compact interpretation is construction in accordance with contemporaneous expectations). The jurisdiction that New York retained in Article III reaches at least as far as controls on such "improvements" of the underwater lands surrounding Ellis Island as were within the contemplation of the 1833 Commissioners. In the 18th and 19th century, the Corporation of the City of New York imposed on the recipients of "waterlot grants" parameters for development with zoning-like specifications that included exact street dimensions and development timetables. *See* Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, at 44-59 (1983) (discussing terms of 18th Century waterlot grants). The New York Commissioners, who were familiar with the terms of such waterlot grants, would have expected New York to have at least this measure of control over the development of the underwater lands surrounding Ellis Island, and, translated into contemporary terms, this means that New York's historic preservation regulations

should apply to the landmark structures on both the "original" and landfilled portions of Ellis Island.[9]

Second, to the extent that the Compact is construed, as it properly may be, as a federal statute, the rights that New York obtained in the bargain it struck with New Jersey in 1833 are no different from the rights conferred by other federal statutes. This Court has repeatedly expanded the scope of the rights and protections derived from such sources to adapt to changed circumstances, so there is no reason that the "police power" conferred by Article III should not be interpreted in similarly contemporary terms. *See Diamond v. Chakrabarty*, 447 U.S. 303 (1980) ("This Court frequently has observed that a statute is not to be confined to the 'particular application . . . contemplated by the legislators.'"); *Barr v. United States*, 324 U.S. 83 (1945) ("If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators."); *see, e.g., United States v. Johnson*, 994 F.2d 980, 986 (2d Cir.) (construing statute ceding land to Federal

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[9] To the extent any uncertainty exists as to the scope of the powers the Commissioners contemplated for New York, New York should be given the benefit of the doubt and acknowledged to hold any powers not expressly granted to New Jersey. Grants from sovereign to subject or another sovereign have traditionally been interpreted most strongly against the *grantee*. *See United States v. Oregon*, 295 U.S. 1, 14 (1935); *Massachusetts v. New York*, 271 U.S. 65, 89 (1926); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 91 N.E. 846, 847 (N.Y. 1910), *aff'd* 229 U.S. 82 (1913). Here, this presumption operates against New Jersey, since it was New York who had acknowledged sovereignty over the whole of the Hudson until 1833, and was thus parting with a measure of its sovereign jurisdiction in Article III. Thus, any ambiguity as to the meaning of Article III's "exclusive right of jurisdiction" in "lands covered by said waters" must be construed against New Jersey and in New York's favor to include all past and present rights not expressly granted to New Jersey by the Compact.

Government for naval purposes so as to avoid "a rigid interpretation of antiquated deeds that did not fully anticipate the complex development of naval operations"), *cert. denied*, 510 U.S. 959 (1993). The Court should do the same here by interpreting the "exclusive right of jurisdiction" left to New York by Article III to extend to the entire array of regulatory powers ordinarily exercised by a state, including the power to police the preservation of Ellis Island as a national landmark.

CONCLUSION

The Court should conclude that New York has sovereign power over Ellis Island by virtue of Article II, and Article II alone. If the Court proceeds further and turns to Article III, it must reject the Report's Article III conclusions because the Report's equation of "property" and "sovereignty" is wholly untenable. In the alternative, should the Court determine that neither Article II nor Article III gives New York sovereignty over Ellis Island and the western half of the Hudson, it should determine that New York has, *at the very least*, "police power" jurisdiction over these areas.

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JOHN J. KERR, JR.
Counsel of Record
SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017-3954
(212) 455-2000
Attorneys for Amici Curiae New York Landmarks Conservancy, Preservation League of New York State, and Historic Districts Council